[Cite as *Hillstreet Fund III, L.P. v. Bloom*, 2010-Ohio-2961.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

THE HILLSTREET FUND III, L.P.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-07-178
	:	O P I N I O N
- vs -	:	6/28/2010
DONALD R. BLOOM, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-02-0909

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BRESSLER, J.

{¶1} Defendants-appellants, Brenda C. Bloom and Donald R. Bloom, collectively the Blooms, appeal from the decision of the Butler County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, The Hillstreet Fund III, L.P. (Hillstreet). For the reasons outlined below, we affirm.

{¶2} On September 22, 2006, Petro Acquisitions, Inc., as well as various other entities owned by Mr. Bloom, executed and delivered a promissory note to Hillstreet in

the amount of $2,500,000. That same day, Mr. Bloom executed an "Unlimited Guaranty," while Mrs. Bloom executed a "Limited Recourse Guaranty" that personally guaranteed the payment of this promissory note.

{¶3} On November 17, 2006, Petro Ventures, Inc., yet another entity owned by Mr. Bloom, executed and delivered a second promissory note to Hillstreet in the amount of $3,000,000. This promissory note, just like the previous one, was personally guaranteed by an "Unlimited Guaranty" executed by Mr. Bloom and a "Limited Recourse Guaranty" executed by Mrs. Bloom. The Blooms' obligations under these guaranties were secured by Hillstreet pursuant to a recorded mortgage against their Butler County property.

{¶4} On September 21, 2007, after the Blooms defaulted on their obligations, the Hamilton County Court of Common Pleas entered judgment against the Blooms in the amount of $5,500,000, plus interest. On September 25, 2007, Hillstreet certified its judgment against the Blooms by filing a certificate of judgment with the Butler County Clerk of Courts, thereby obtaining a judgment lien against the Blooms' property.

{¶5} On February 14, 2008, Hillstreet filed a "Complaint in Foreclosure" seeking to foreclose upon its judgment lien and have the proceeds applied to the certified judgment. On December 17, 2008, Hillstreet filed a motion for summary judgment, which the trial court granted. Thereafter, once the trial court entered its "Judgment Entry and Decree in Foreclosure," the Blooms appealed, raising one assignment of error.

{¶6} "THE TRIAL COURT ERRED IN GRANTING [HILLSTREET'S] MOTION FOR SUMMARY JUDGMENT."

{¶7} In their single assignment of error, the Blooms argue that the trial court erred by granting summary judgment in favor of Hillstreet. We disagree.

{¶8} Summary judgment is a procedural device used to terminate litigation and

avoid a formal trial when there are no issues in a case to try. *Forste v. Oakview Constr., Inc.,* Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. A trial court's decision granting summary judgment is reviewed de novo. *Creech v. Brock & Assoc. Constr.,* 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. In turn, an appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard,* citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶9} A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-

Ohio-3730, ¶10.

{¶10} Initially, the Blooms argue that the trial court erred by "completely disregarding" Mr. Bloom's affidavit, and that had the affidavit been "properly considered," it would have created "a genuine issue of material fact as to whether Hillstreet had been paid in full."[1] However, besides Mr. Bloom's self-serving affidavit, the Blooms did not provide the trial court with any further evidence to support their claim. In turn, because Hillstreet provided evidence indicating the Blooms still owed $6,320,498 on the outstanding loan balance, and because it is well-established that a "party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact," we find no error in the trial court's decision granting summary judgment in Hillstreet's favor. *TJX Cos., Inc.* v. *Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372,¶30; see, e.g., *Wells Fargo Bank v. Blough*, Washington App. No. 08CA49, 2009-Ohio-3672, ¶18-19 (self-serving affidavit insufficient to demonstrate the existence of a genuine issue of material fact). To hold otherwise would "necessarily abrogate the utility of the summary judgment exercise" and allow the Blooms, the nonmoving party, to avoid summary judgment "by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party." *Pavlik v. Cleveland*, Cuyahoga App. No. 92176, 2009-Ohio-3073, ¶21; *Bell v. Beightler*, Franklin App. No. 02AP-569, 2003-Ohio-88, ¶33.

{¶11} The Blooms also argue that the trial court erred by granting summary judgment to Hillstreet because it "ignored the plain language" of Mrs. Bloom's "Limited Recourse Guaranty" she executed in November of 2006. However, after a thorough

1. Mr. Bloom's affidavit states, in pertinent part, that based on his conversations with Thomas E. Perazzo, "the accountant and duly authorized representative of [Hillstreet], [Hillstreet] has been paid or

review of the record, we find the Blooms' claim can be classified as nothing other than an impermissible collateral attack on the September 21, 2007 judgment entered by the Hamilton County Court of Common Pleas. See *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶16-26. Therefore, we agree with the trial court's finding that any challenges to the validity of the various guaranties "were matters to be undertaken in the Hamilton County Court case."

{¶12} Accordingly, because we find no error in the trial court's decision granting summary judgment in Hillstreet's favor, the Blooms' sole assignment of error is overruled.

{¶13} Judgment affirmed.

YOUNG, P.J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶14} Although I concur with the decision of the majority, I write separately because I disagree with the majority's dismissal of appellant's affidavit for being "self-serving."

{¶15} The Blooms' primary defense in this matter was a claim that the debt had been fully paid to Hillstreet. In support, Mr. Bloom offered an affidavit stating that in a conversation with Tom Prozo, Hillstreet's accountant, Prozo admitted that Hillstreet had received payments in excess of the amount owed.

{¶16} The majority characterizes Mr. Bloom's affidavit as "self-serving." The cases cited by the majority illustrate what a "self-serving" affidavit is. Yet, when

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acknowledges credits against the Hillstreet Loans" in the amount of $7,199,675. The Blooms provided no

compared to the affidavits in those cases, the statement in this matter is not "self-serving."

{¶17} In opposition to the motion for summary judgment in *TJX Cos., Inc. v. Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372, the appellants submitted affidavits generally denying their liability and contesting their criminal convictions. Id. at ¶30. In *Wells Fargo v. Blough*, Washington App. No. 08CA49, 2009-Ohio-3672, the appellant-affiant submitted an affidavit claiming that he had not agreed to the term of a contract. Id. at ¶18. In *Pavlik v. Cleveland*, Cuyahoga App. No. 92176, 2009-Ohio-3073, Pavlik submitted an affidavit claiming that he provided the city with a copy of the title to a motorcycle in clear contradiction of the evidence. Id. at ¶21-22. See, also, *Bell v. Beightler*, Franklin App. No. 02AP-569, 2003-Ohio-88, ¶28 and ¶34.

{¶18} The statement at issue in this case is not Mr. Bloom generally denying liability or claiming that an event did not occur as in the cases cited by the majority. Rather, the source of the statement is not the affiant, but another individual. More significantly, the statement at issue in this case is an admission of a party-opponent, Hillstreet's accountant Tom Prozo. Evid.R. 801(D)(2)(a) provides that statements of a party-opponent are admissible nonhearsay. Further, Mr. Prozo's statement was not made in self-interest. It is a statement against his company's interest, acknowledging that the Blooms' obligation had been paid. None of the cases cited by the majority involve an affidavit attributing an admission of a party-opponent. The court should be cautious in labeling and dismissing certain evidence which is not, in actuality, "self-serving."

{¶19} The Second Appellate District had the opportunity to address the same set of facts as this case in *Hillstreet Fund III, L.P. v. Bloom*, Montgomery App. No. 23394,

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further evidence to substantiate this claim.

2010-Ohio-2267; and *Hillstreet Fund III, L.P. v. Bloom*, Miami App. No. 09CA12, 2009-Ohio-6583. In those cases, like this case, Hillstreet filed a complaint in foreclosure seeking proceeds from properties owned by the Blooms in Montgomery and Miami counties. On appeal, the Blooms similarly argued that the common pleas court did not properly consider the admission by Tom Prozo. The Second District concluded that the affidavit was insufficient to create a genuine issue of material fact because the statement attributed to Prozo was conclusory and the facts supporting Prozo's conclusion were not within Mr. Bloom's personal knowledge. 2009-Ohio-6583 at ¶13; 2010-Ohio-2267 at ¶54.

{¶20} I agree that these statements could be considered "conclusory" with the basis for the statements being outside Mr. Bloom's personal knowledge. However, the personal knowledge requirement and the inadmissability of conclusory statements does not pertain to admissions by party opponents since party admissions are considered so highly prejudicial. See Am.Jur.2d Evidence Section 770; *United States v. Ammar* (C.A.3, 1983), 714 F.2d 238; *Oregon v. Harberts* (1993), 315 Or. 408, fn. 11 ("A statement of a party-opponent may be admissible over a hearsay objection as non-hearsay, even though the statement is not based on personal knowledge and is in opinion or conclusory form or language"). The personal knowledge requirement is met by the affiant, Mr. Bloom. Specifically, Tom Prozo personally acknowledged to Mr. Bloom that the obligation had been paid. In reviewing the motion for summary judgment, Mr. Bloom's affidavit should be properly considered as an admission by a party opponent. *Huss v. Amoco Corp.* (Mar. 5, 1999), Greene App. No. 98-CA-52, 1999 WL 115001, *3. By failing to consider the statement attributed to Prozo in Mr. Bloom's affidavit and characterizing the statement as "self-serving," the majority is creating a slippery slope which neither supports the purpose nor intent of the Evid.R. 801.

{¶21} Nevertheless, this case should be affirmed on a different basis. Appellant's obligation was determined in the foreclosure action in Hamilton County. Hillstreet sought to execute that judgment in the various counties where the Blooms owned property. Civ.R. 60(B)(4) allows for a party to seek relief from judgment once a judgment has been fully satisfied. If the amount had been paid in full and the judgment had been satisfied as the Blooms suggest in the instant matter and the Second District cases, they should have filed a Civ.R. 60(B)(4) motion with the Hamilton County Court of Common Pleas. See *Rowland v. Finkel* (1987), 33 Ohio App.3d 77. Once the Blooms' obligation had been determined in Hamilton County, it is not the purpose of the common pleas courts in Butler, Miami, and Montgomery Counties, the Second District Court of Appeals or this court to independently relitigate and review whether the Blooms had satisfied their obligation. If their statements that the obligation has been satisfied are true, the Blooms could have prevented these derivative actions in Miami, Montgomery and Butler counties, and their subsequent appeals by simply filing a Civ.R. 60(B)(4) motion in Hamilton County. Since the Blooms failed to appropriately seek relief from the Hamilton County judgment, I concur with the majority in affirming the trial court's grant of summary judgment in favor of Hillstreet.